IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11113 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRAVINSINH DILUBHA

Versus

DISTRICT REGISTRAR

Appearance:

1. Special Civil Application No. 11113 of 1998

MR SHIRISH JOSHI for Petitioner No. 1-5

RULE SERVED for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 26/09/2002

ORAL JUDGEMENT

The short facts of the case are that the petitioners are the office bearers of the Shree Monpur

Sahakari Sangh Mandli Ltd (hereinafter referred to as "the Society"). The State Govt floated the scheme for abolition of debts of agriculturists pursuant to the policy declared by the Govt.of Gujarat. As per the said scheme if any agriculturist who had taken loan of less than Rs.10,000/- the amount was to be waived and if the agriculturist has taken loan exceeding Rs.10,000/- he would be entitled to waiver of 50% of the said amount and the balance amount was to be paid by the agriculturist as outstanding on the date when the scheme came into force. The society had taken loan on the interest at the rate of 7.5% p.a. from Bhavnagar Dist.Coop.Bank Ltd (hereinafter referred to as "the Dist.Bank"). The loan, pursuant to the policy of the State Govt, was to be recovered from the agriculturists who had taken loan exceeding amount of Rs.10,000/-. However, instead of recovering the amount from the member-agriculturists concerned the Managing Committee of the society comprising of petitioners took a decision to take loan of Rs.9,47,309/- from the Dist.Coop.Bank Ltd on interest at the rate of 14% p.a. and credited as recovery from the members concerned with a view to see that the benefit under abolition of agriculturists' debt scheme is made available. One of the contentions of the petitioner-society was that if the amount of loan was not paid the society would have been shown as defaulter by the Dist.Bank and therefore also the loan was taken. Be that as it may, there is no dispute on the point that the additional amount of loan which was taken on interest at 14% p.a. whereas the existing outstanding loan which was earlier taken from the Dist.Coop.Bank was on interest at the rate of 7.5% p.a. The case of the petitioner is that they had taken fresh loan from the Dist.Coop.Bank with a view to provide the said loan to the farmers who are members of the society so that these farmers can take the benefit of the abolition of agriculturists' debt scheme. The said scheme is produced on record and the clause 6 of the said scheme provides that if the amount is fully paid by the concerned agriculturists after deduction of available set-off or waiver of the debt then only he would be entitled to fresh loan. It is the case of the petitioner that after the fresh loan on interest at the rate of 14% p.a. was taken, the Govt did not extend the benefit of said scheme of abolition of agriculturists' debt and therefore the society had to bear the burden of interest. The facts in detail shall be dealt with hereinafter. However, the aforesaid is the background of the matter.

2. It appears that the Dist.Registrar, Cooperative Societies, Bhavnagar in the year 1993 passed order for

holding inquiry under section 94 of the Act on the basis of the report submitted by the Auditor that due to the action of the Managing Committee of the society of taking loan on interest at the rate of 14% p.a. as against the earlier loan given to the farmers on interest at the rate of 7.5% p.a. the society has suffered loss of difference of interest at the rate of 4.75% p.a. amounting to Rs.21,002/- There was also aduit inquiry report that the expenses of postage and telegram charges of Rs.10/- and Rs.107/- have wrongly debited and it was also further mentioned in the audit report that for attending rally of cooperative societies on 8.11.991 at Gandhinagar the travelling expenses of Rs.1257/- is wrongly debited. It was on account of aforesaid remarks and quarries raised in the audit report the order was passed by the Dist.Registrar for holding inquiry under section 93 of the Act. The inquiry officer, in addition to the amount of Rs.21,002/- as referred to by the auditor, also included further amount of interest at the rate of 18% p.a. on the aforesaid amount of Rs.21,002/-. It was included by him as Rs.12,894/-. Thus in all it was Rs.33,896/-(Rs.21,002/-+ Rs.12,894/-). Inquiry Officer has issued chargesheet, reply was submitted and witnesses including the auditor were examined and ultimately on 30.11.1994 the Inquiry Officer found that each of the petitioners is liable for amount of Rs.7,430.60ps, totalling to Rs.37,153/-+ Rs.2,000/- towards expenses of inquiry and if the amount is not paid within one month further interest at the rate of 18% p.a. also be recovered. Copy of said inquiry report is produced at annexure "B" to the petition.

3. The petitioners preferred appeal before the Gujarat State Cooperative Tribunal being Appeal No.3/95. It is the case of the petitioners that written arguments were submitted and all the contentions are not taken into consideration. However, the tribunal, ultimately passed judgment and order dated 8.10.1998 whereby the tribunal observed that all the principles of natural justice are complied with while holding inquiry by the Inquiry Officer and there is no material irregularity committed by the inquiry officer and therefore the appeal is dismissed. Under the circumstances, the petitioners preferred this petition.

4. Mr.Joshi appearing on behalf of petitioners mainly raised contentions that there is no mensrea and the action is in bonafide exercise of powers and with a view to see that all the members of the society can get the benefit of the scheme of the Govt for abolition of

debts of agriculturists and therefore in the absence of any mensrea the liability under section 93 can not be fastened. Mr.Joshi also submitted that all the members of the society have been benefited therefrom and the aforesaid loan was only by way of internal arrangement between the society and the District Bank and since the State Govt did not reimburse the amount of set-off this complication has arisen. Mr.Joshi also submitted that the tribunal has not examined the merits of the contentions raised by the petitioners and has only examined the procedural aspect of holding inquiry and Mr.Joshi also submitted that similar course was undertaken by the other societies who also took loan from the Dist.Coop.Bank but no actions were initiated under section 93 of the Act against office bearers of the said societies and it was only against the office bearers of the petitioner society because they belong to the group of Mr.Jadeja who was the Chairman of the Bank and the said group was in political rivalry with the Minister for Cooperation department Shri Godhani. It was submitted that in any case the decision of the Managing Committee is approved by the General Body and therefore the liability under section 93 of the Act can not be fastened upon the petitioners who were the members of the Managing Committee. Mr.Joshi submitted that in any case holding the petitioner liable for the postage expenses and for travelling expenses is absolutely without any basis and even no cogent reasons are recorded by the Inquiry Officer for such purpose nor there is any discussion by the tribunal in this regard. Therefore, the order under section 93 of the Act is vulnerable. Mr.Joshi submitted that in any case even if this court finds that it is the order under section 93 of the Act, then the same would operate harsh against the petitioner in view of Rule 32 of Gujarat Cooperative Societies Rules and he therefore submitted that Rule 32 of Gujarat Cooperative Societies Rules must be read to the extent that the disqualification under section 93 of the Act would operate only qua the term of the election which would normally for three years and not permanently. Mr.Joshi has also relied upon the judgment of this court in the case of Shankarbhai Devjibhai Patel vs Sabarkantha Jilla Sahakari Kharid Vechan Sangh Ltd reported in 1984 GLH 498 to contend that the liability can be fastened under section 93 of the Act only if the conditions as observed by the court at para 28 are satisfied and he submitted that no such conditions are satisfied in the present case. Mr.Joshi also relied upon the unreported judgment of this court dated 25.9.01 in SCA N.478/91 wherein the court directed only for recovery of amount and the further disqualification was not maintained since the

amount was recovered and therefore he submitted that the same course at the most can be maintained in the present case also.

5. Ms.Manisha Shah, Ld.AGP appearing on behalf of the District Registrar has supported the order passed by the tribunal as well as the Inquiry Officer and she also placed reliance upon the judgment, dated 16.8.02 of this court in the matter of Ishwarbhai Narottambhai Patel vs K.H.Trivedi and she submitted that majority of the issues and the points which are raised in this petition are covered by the aforesaid judgment and the judgment reported in 1984 GLH 498 and therefore this petition deserves to be rejected.

6. The facts and circumstances of the case as apparent from the record show that the loan which was obtained by the society and in turn granted to the members was at the rate of 7.5% p.a. interest. As a matter of fact, if any agriculturist or farmer seeks to avail of the benefit of abolition of debts, then in that case he was required to make the payment of balance amount as per the scheme and then only the said benefit of the scheme was available. The intention of the scheme was to abolish the debt of small farmers. As per the scheme it was required for the person concerned, namely, the farmer to pay the balance amount and then only the debt would be abolished or he would not be required to make the payment and in the absence of any payment by the farmers concerned, it can not be said that the farmers concerned would get the benefit of the said scheme. It is not the case of the petitioners that the farmers have made the payment or from the record it appears that to show the payment of debts by the farmers the new loan was taken by the office bearers of the society at higher rate of interest and the amount is not paid by the farmers concerned. As per the scheme of abolition of agriculturists' debts concerned farmer would be entitled to the benefit of the scheme only if he makes the payment of balance amount. Therefore, as a prudent office bearer of the society, it was required for the petitioners to take steps for recovery of the balance loan amount before giving set-off as per the scheme of Abolition of Agriculgurists' debts and to give rather set-off only if the balance amount is paid by the member concerned or the farmer concerned. Instead of doing so, with a view to take benefit of the scheme the outstanding loan is shown as credit by the society so that the payment may not remain overdue to the Dist.Bank and the benefit of the said scheme may be procured though it was not genuinely available at the relevant point of time as per the said

scheme. In that view of the matter, the finding arrived at by the Inquiry Officer which is confirmed by the tribunal so far as the loan at higher rate of interest is concerned, I find that the office bearers of the society who are the petitioners herein have not acted as prudent persons and the normal conduct of any such office bearer of the society would be to recover money from the member concerned and then to show the amount as credit and to repay the said amount of old loan of lower rate of interest no prudent person would get fresh loan at higher rate of interest . Normal conduct of any prudent and responsible office bearer of the society would be either to continue with the said loan at lower rate of interest or in any case to make payment of loan which was being enjoyed at the lower rate of interest after making recovery from the members concerned and there was absolutely no justification to pay up the loan at lower rate of interest by taking fresh loan at higher rate of interest. If the members of the society wanted to take benefit of Debt Abolition Scheme it was for the members concerned to repay the balance amount and to avail of the benefit but if the members failed to do so there was absolutely no justification on the part of petitioners in capacity as office bearers of the society to burden the society with the loan at higher rate of interest, that too for the purpose of showing the recovery which was otherwise not made by the members concerned so as to enable the member concerned to get the benefit of the debt abolition scheme.

7. At this stage it would be worthwhile to refer to some of the observations made by this Court in the judgement dated 28-1-2002 in LPA No.8/2002 of the Division Bench. In a matter of supersession of the Market Committee, while dealing with the contentions of the elected body that when two views are possible, it cannot be said that default is committed in performance of duties. While testing the said submission it was observed by the Division Bench at para 9 as under:

" The status of the elected members of the market committee is more or less like the status of other elected members holding the office under the local authorities or statutory authorities. It is true that the market committee has been given power to purchase and sell its property, but its power to purchase and sell the properties are coupled with the duty to ensure that such powers are used for enforcement of the objects of the At, rules and bye-laws. These powers are coupled with the public duty and such powers are

not like powers of individual persons managing their own affairs but there is something more about the accountability. It is needless to point out that when any representative is elected by the voters, some faith is reposed on such elected representative by the voters that the so elected representative would exercise his powers under statutes for the larger interested of the institution or the local body by acting as a wise person keeping in view the pros and consequences of the action to be taken and keeping in view the interest of institution or the body."

The aforesaid observations were considered in the matter of Ishwarbhai (supra) and the court had observed as under:

"I am of the view that the observations made by the Division Bench were pertaining to the elected body of a market committee in a matter of supersession of a market committee which is a statutory body. I find that the status of the elected members of the society is more or less at par with the elected representative of such market committee or any other elected representative. Perusal of the scheme of the Gujarat Cooperative Societies Act also shows that the principles of accountability is maintained even in the affairs of the administration of cooperative societies. In that view of the matter, I find that there is no reason why such principles should not be applied to the elected representative of the cooperative society also. In the present case, there was absolutely no jurisdiction for condoning the amount because the test would be whether any prudent person would allow an amount of Rs.1,45,000/to let go merely because the supplier had supplied a machinery of good quality or merely because he has earned good profit out of it. The normal conduct of any office bearers of the society or even a normal prudent person would insist that the excess payment which is made must be refunded because the price of the machinery which was fixed was for supplying genuine and good quality machinery and invest was with a view to make profit and, therefore, there can be hardly any jurisdiction for condoning such amount."

8. In my view the facts of the present case may be

different but the nature of conduct on the part of office bearers of the society is more or less the same in as much as normally no prudent person would take decision of taking loan at higher rate of interest for paying the loan taken at the lower rate of interest from the very District Bank . In the present case also the said aspect is coupled with the fact that the finding of the Inquiry Officer under section 93 of the Act is confirmed by the tribunal exercising appellate powers and therefore in my view the action can not be said to be bonafide and when the action is not in the financial interest of the society itself merely because it is in the interest of some members can hardly be said to be a ground from escaping the liability under section 93 of the Act. As a matter of fact, the petitioners by acting in the capacity of office bearers of the society have tried to confer the benefit upon the members to which they were not possibly legitimately entitled. If the application of fund is for the purpose wholly ultravires to the to the purpose/object of the society, merely because it is approved by the general body of the society, it can not be said that there is protection available to the office bearers of the society against the proceedings under section 93 of the Act. Section 93 of the Act is with a view to make the office bearers of the society accountable for their duties and the said accountability is by statutory provision and once the accountability or the liability is created by statutory provision, it can not be nullified even by the general body of the society and therefore the contention raised by Mr.Joshi fails and can not be accepted.

9. Further, in this regard, it may also be stated that the reliance placed upon the judgment in case of Shankarbhai (supra) would also be not of any help to the petitioners because even if the principles laid down in the aforesaid judgment are considered, then also as observed above, the present case is covered by misapplication of funds for the purpose of wholly ultravires the the purpose/objects of the society and there is gross negligence in application of funds of the society since normally no prudent office bearer of the society would act, and therefore, the said judgment is of no help to the petitioners.

10. The contention raised on behalf of petitioners regarding political malafides, in my view, is also of no substance because firstly there is no material produced on record to show that the action is initiated under the instructions of a Hon'ble Minister concerned at the

relevant point of time and secondly because when on merits there was a case for initiation of action and if the action is initiated and the liability is lawfully fastened under section 93 of the Act the petitioners can not escape from the liability by making allegation that the same is with political malafides.

11. As regards the allegation of not initiating action against similarly situated societies is concerned, no cogent details with authenticated material are produced on record and even if such is the case then also merely because the authority has failed to take action against certain wrong doers can hardly be said to be a valid ground for the person who has committed wrong to say that there is any discrimination. The ground of discrimination can be raised for the purpose of availing the legitimate benefits legally permissible and it can not be raised for tainting to perpetuate illegalities and therefore in my view there is no substance in the contention raised on the alleged ground of discrimination and hence deserves to be rejected.

12. Reliance is placed upon the aforesaid unreported judgment of this court in Spl.C.A.No.4782/91. It may be stated that in the case of Ishwarbhai Patel (supra) reliance was placed similarly upon the very decision and this court at para 20 & 21 had observed as under:

"20. Reliance is placed by both the Counsel for the petitioners upon the judgement dated 25-9-2001 passed in SCA No.4782/1991, which is also of no help to the petitioners for the reasons stated hereinafter. In the said judgement at para 5, the Court has observed as under:

" I have gone through the reasonings of the Tribunal and the Inquiry Report of the I.O. After considering the same, it cannot be said that the authority has committed an error in passing the order against the petitioner. This being a petition under Article 227 of the Constitution of India, it is not open for this Court to re-appreciate the material on record and to take a different view in the matter. The findings recorded by the Tribunal are essentially the findings of fact on appreciation of material on record. Therefore, it is not possible for me to accept the submission advanced on behalf of the petitioner. However, there is neither allegation in the show cause notice, nor finding

recorded that the petitioners misused the money of the Sangh with oblique motive, namely that they misappropriated the amount. Even if the allegations made against the petitioners are accepted, the same at the most, can be termed as bonafide mistake without any unjust or improper motive. It would not amount to misconduct inviting action under section 93 of the Act."

21. Therefore, in view of the same the Court ordered for clarifying that it would not attach the disqualification under Rule 32 of the Gujarat Cooperative Societies Act. In the present case for the reasons stated hereinabove, it is found that it was not a case of mistake of utilisation of the fund, but it was rather a case of gross negligence in using the fund for a different purpose than the purpose of the society and no such prudent, elected representative or any person could have condoned the huge amount of Rs.1,45,000/-. It is also found that such conduct would attract the action under Section 93 of the Act and when the order under Section 93 of the Act is examined on merits and is found it proper, merely because the amount is paid is no ground for removing the disqualification under Rule 32 of the Rules because, in my view, if such indulgence is shown it would frustrate the intention of the legislature to keep such persons out of the affairs of the society at the time of becoming members of the Managing Committee, more particularly when, on account of such persons, the society has not only suffered loss of funds, but the conduct would be such that the persons should not be allowed to assume the office. Therefore, on the face of Rule 32 clause (f) and the intention of the legislature, I am of the view that the judgement passed in SCA 4782/1991 is of no help to the petitioners and the said contention also fails."

Therefore, in my view, the similar contention raised by Mr.Joshi would also fail on the basis of the same reasons in the present case.

13. Lastly, Mr.Joshi had tried to canvass that Rule 32 would operate as disqualification till the next election becomes due and not as a permanent disqualification. In this regard it would be profitable to refer to the observations of this court in the matter of Ishwarbhai Patel (Supra) where at paras 18 & 19 this

court has observed as under:

"18. It is, therefore, evident that the proceedings under Section 93 are judicial proceedings. Once the proceedings under Section 93 of the Act are initiated and concluded, the parallel proceedings under Section 96 of the Act cannot be initiated and proceeded with. Though the proceedings under Section 93 of the Act are initiated by the Registrar and the proceedings under Section 96 can be initiated by the Cooperative Society itself, they are for all practical purposes parallel proceedings and the judgement given earlier in one proceedings would bar the second proceedings. The Legislature that has enacted sections 93 and 96 of the Act cannot be credited with a view that it permitted two parallel proceedings even by risking the two conflicting judgements. It is thus inevitable that the proceedings under Section 93 and those under Section 96 are mutually exclusive in the sense that even in judicial proceedings earlier, the said findings would operate as a res judicata in respect of the very same subject matter. Therefore, the proceedings under Section 93 and 96 are mutually exclusive and the findings in any of the proceedings would operate as res judicata on the same subject matter, whereas in the present case such is not the situation. In the present case there are no 96 proceedings at all. Merely because the findings in either of the proceedings is treated as res judicata for the very subject matter in the other proceedings, it cannot be said that the consequence under Section 93 and the consequence under Section 96 are the same and it should meet with the same fate. The Rule 32 (1)(a) reads as under:

"he is not in default in respect of any loan taken by him for such period as is specified in the bye-laws"

Clause (f) of the Rule 32 reads as under:

"no order is made against him under sec. 93"

19. Therefore, when the legislature has consequently made provisions for not including the disqualification in a matter where the order is passed under Section 93 of the Act and, this Court in exercising power under Article 227 or

226 of the Constitution of India can neither substitute the wisdom of the legislature, nor can it be said that the order under Section 93 should not be read so as to attach a permanent disqualification to a person concerned for becoming member of the Managing Committee, which otherwise could not have been done if the proceedings under Section 96 were to be resorted to. In the present case though there is no provisions under Section 96 of the Act, the effect of the order under Section 93 of the Act qua the disqualification cannot be deleted when the legislature has specifically intended to attach the disqualification under Section 93 only and, therefore, I cannot accept the submission made by Mr.Patel that since the society can also resort to the proceedings under Section 96, the order under Section 93 of the Act should not attach the disqualification as provided under Rule 32 of the Act."

14. In addition to the above, it appears that the intention of the legislature is to keep such persons away from the management of the society permanently, if the liability is fastened under section 93 of the Act. If such interpretation is given as operating disqualification until the next term of election, in my view it may result into addition of words which are otherwise not provided by the legislature and therefore such contention of Mr.Joshi also fails and deserves to be rejected.

15. There is considerable force in the submission of Mr.Joshi regarding passing of order under section 93 of the Act so far as it relates to fastening liability for expenses of Rs.1140/- for attending the rally on 18.11.1991 and expenses of post and telegram amounting to Rs.107/-. Perusal of the order passed by the Inquiry Officer shows that no cogent reasons are recorded for such purpose which would show that there was any gross negligence or the utilisation of fund was ultravires the purpose/objects of the society. The tribunal has also not discussed the said aspect. Even on merits spending amount of Rs.107/- towards telegrams and Rs.10/- towards postage and travelling expenses of Rs.1140/- for attending rally at Gandhinagar can hardly be said to be gross negligence or utilisation of funds wholly ultravires the purpose/objects of the society. In the administration of society the members have discretion to select the mode of communication, may be by telegram or

may be by post. Similarly, the office bearers of the society may take decision to attend the conference or meeting of cooperative sector held at the capital of the State and further the amount of accountability in this matter is only of Rs.1257/-. Therefore in my view under these circumstances the same can hardly be said to be a ground for fastening under section 93 of the Act. The aforesaid aspect was required to be examined by the tribunal and since the same is not considered the final order under Section 93 deserves to be modified accordingly.

16. Lastly, Mr.Joshi has also submitted that the arguments made on merits are not examined and the tribunal has only examined the procedural aspects on merits. Normally, it is true that the quasi judicial authority, more particularly, the tribunal while considering the matter under section 93 of the Act may also examine the merits of the case because it is exercising appellate power, but at the same time it is not necessary for the appellate court to deal with each and every contention as desired by the either party. In any event, I am not required to examine the said aspect in detail, more particularly, when this court has examined the contentions of the petitioners on merits and has found that the order under section 93 deserves to be maintained qua the liability of interest of loan and deserves to be set aside qua the post, telegram and travelling expenses no useful purpose would be served by remanding the matter to the tribunal merely on the ground that certain contentions are not dealt with or the reasons are not recorded while dealing with the said contentions.

17. In view of the above discussion the petition is partly allowed by maintaining the order passed under section 93 of the Act and its confirmation by the tribunal so far as it relates to fixing the liability of interest amounting to Rs.33,896/- with running interest and costs of Rs.2,000/- towards remuneration of the Inquiry Officer. However, the said order so far as it relates to fixing liability of Rs.1,257/- towards telegram, postage and travelling expenses are concerned is quashed and set aside and it is further made clear that the liability pursuant to the order under section 93 of the Act proportionately against each petitioner shall stand reduced as observed earlier. Petition is partly allowed to the aforesaid extent. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

26.9.02 (JAYANT PATEL,J)